

# Decision Notice



Decision 037/2010 Mr Tom Gordon and VisitScotland

Internal audit reports

Reference No: 200900988  
Decision Date: 8 March 2010

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## Summary

Mr Tom Gordon requested from VisitScotland copies of seven internal audit reports. VisitScotland withheld the requested information under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, VisitScotland disclosed much of the information previously withheld, but continued to withhold some or all information within six of the reports. Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, VisitScotland disclosed additional information, but continued to withhold parts of three reports in terms of sections 33(1)(b) and 39(1) of FOISA.

Following an investigation, the Commissioner found that VisitScotland had partially failed to deal with Mr Gordon's request for information in accordance with Part 1 of FOISA. He found that the majority of the information that VisitScotland still wished to withhold at the end of the investigation had been correctly withheld in terms of section 33(1)(b) of FOISA. However, he concluded that this exemption and that in section 39(1) had been wrongly applied to some of the information withheld. The Commissioner required VisitScotland to disclose the information specified at the end of this decision.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) section 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 33(1)(b) (Commercial Interests and the economy) and 39(1) (Health, safety and the environment).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 25 February 2009, Mr Gordon emailed VisitScotland requesting copies of the following internal audit reports (which had been identified following a previous information request):
  - 1 State Aid Restrictions
  - 2 Funding Stipulations
  - 3 Tendering Procurement Process
  - 4 Marketing Operational Performance Management



- 5 Fraud Prevention
  - 6 Tourist Board Training
  - 7 Annual Internal Audit Report
2. VisitScotland responded on 25 March 2009. It notified Mr Gordon that it was withholding all of the requested information under section 33(1)(b) of FOISA, on the basis that its disclosure would be likely to adversely impact VisitScotland's commercial interests.
  3. On 25 March 2009, Mr Gordon emailed VisitScotland requesting a review of its decision. In particular, Mr Gordon did not agree with VisitScotland's application of the exemption in section 33(1)(b) of FOISA. He noted that it appeared that VisitScotland had applied the exemption on a blanket basis, without noting, for example that some of the information related to operations some time ago and in a different climate.
  4. VisitScotland notified Mr Gordon of the outcome of its review on 12 May 2009. VisitScotland revised its original response and it disclosed report 4 (Marketing Operational Performance Management) in full and disclosed versions of remaining reports with some content withheld. Visit Scotland continued to withhold the following information:
    - Report 5 (Fraud Prevention) - withheld in full under section 33(1)(b) of FOISA.
    - Names of individuals identified as having responsibility for taking forward actions within reports 1 (State Aid Restrictions), 2 (Funding Stipulations), 3 (Tendering Procurement Process), 6 (Tourist Board Training) and 7 (Annual Internal Audit Report) - withheld under section 38(1)(b) of FOISA.
    - Names of third party companies in report 3 (Tendering Procurement Process) - withheld under section 33(1)(b) of FOISA.
    - Information in report 7 (Annual Internal Audit Report) withheld under section 33(1)(b) of FOISA.
  5. On 26 May 2009, Mr Gordon wrote to the Commissioner, stating that he was dissatisfied with the outcome of VisitScotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
  6. The application was validated by establishing that Mr Gordon had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



## Investigation

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7. On 8 June 2009, VisitScotland was notified in writing that an application had been received from Mr Gordon and it was asked to provide the Commissioner with any information withheld from Mr Gordon. VisitScotland provided the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted VisitScotland, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, VisitScotland was asked to justify its decision to withhold the information specified in paragraph 4 and its reliance on the exemptions in FOISA it considered applicable to this information.
9. VisitScotland responded on 17 August 2009. It explained that it had reconsidered its response to Mr Gordon, it now longer wished to rely upon section 38(1)(b) to withhold any information and had revised its position as follows:
  - All names of individuals that had previously been withheld within partially released reports could now be disclosed. This meant that VisitScotland no longer sought to withhold any parts of reports 1 (State Aid Restrictions), 2 (Funding Stipulations) or 6 (Tourist Board Training).
  - Two third party company names previously withheld within in report 3 (Tendering Procurement Process) could be disclosed. Another third party company name was still being withheld under section 33(1)(b) of FOISA;
  - Report 5 (Fraud Prevention) could be released, subject to some content still being withheld in terms of section 33(1)(b) of FOISA. The exemption in section 39(1) of FOISA was also applied to the same information.
  - Some information previously withheld in report 7 (Annual Internal Audit Report) under section 33(1)(b) of FOISA could be disclosed. However, the exemption in section 33(1)(b) was still applied to three bullet points, and the exemption in section 39(1) of FOISA was also applied to this information.
10. VisitScotland also provided submissions to explain the rationale for its application of the exemption in section 33(1)(b) of FOISA, and the reasons for its decision to withhold the content it still wished to withhold within reports 3 (Tendering Procurement Process), 5 (Fraud Prevention) and 7 (Annual Internal Audit Report).
11. In further communications, the investigating officer subsequently requested, and VisitScotland provided, additional submissions on the exemptions in sections 33(1)(b) and 39(1) of FOISA. Visit Scotland was also asked to confirm what actions had been undertaken in the period between the creation of the reports under consideration and the handling of Mr Gordon's request and the subsequent review.



12. On 9 September 2009 VisitScotland disclosed the additional information that it no longer considered exempt (in line with its revised position set out in paragraph 9 above) to Mr Gordon.
13. Mr Gordon was invited to provide comment on the case, and in particular to set out his views as to why the public interest would be served by the disclosure of the remaining withheld information. The investigating officer also advised Mr Gordon that (in line with the Commissioner's usual practice) the information disclosed during the investigation would not be considered within the Commissioner's decision in this case.
14. Mr Gordon provided his comments on the same day, and confirmed that he still wished to receive a decision from the Commissioner as to whether the remaining information had been withheld appropriately.

## **Commissioner's analysis and findings**

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15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Gordon and VisitScotland and is satisfied that no matter of relevance has been overlooked.

### **Information under consideration**

16. As noted above, this decision will consider only the information that VisitScotland continued to withhold following its reconsideration of the information requested by Mr Gordon during the investigation. This is:
  - Report 3 (Tendering Procurement Process) – name of a third party company withheld under section 33(1)(b).
  - Report 5 (Fraud Prevention) – several paragraphs withheld under sections 33(1)(b) and 39(1).
  - Report 7 (Annual Internal Audit Report) –three bullet points withheld under sections 33(1)(b) and 39(1).

### **Consideration of section 33(1)(b) (Commercial interests and the economy)**

17. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption, subject to the public interest test required by section 2(1)(b) of FOISA.



18. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests might be harmed by disclosure, the nature of those commercial interests and how those interests would, or would be likely to, be prejudiced substantially by disclosure. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests would, or would be likely to, prejudice substantially.
19. In this case, Visit Scotland applied the exemption in section 33(1)(b) on two different grounds:
  - With respect to the name of a third party contractor included within report 3 (Tendering and Procurement Process), disclosure would or would be likely to prejudice substantially the commercial interests of that third party.
  - With respect to the remaining information withheld within reports 5 (Fraud Prevention) and 7 (Annual Internal Audit Report), disclosure would or would be likely to prejudice substantially the commercial interests of VisitScotland and members of the public.
20. The Commissioner has considered these matters in turn below.

*Consideration of the third party's commercial interests*

21. VisitScotland stated that a third party's commercial interests would be prejudiced substantially by the disclosure of its name in report 3 as such disclosure would reveal how much money that company charged for a particular contract. This third party is named in report 3, alongside the expenditure under the relevant contract, as an example of contracts not subject to EU tendering processes.
22. VisitScotland confirmed that it had sought the third party's views as to whether its name should be disclosed, and that the third party had objected to disclosure.
23. The Commissioner first considered whether the third party company has relevant commercial interests. Commercial interests generally relate to any commercial trading activity that a company undertakes, such as the sale and purchase of products or services, commonly for the purpose of generating revenue. Such activity will normally take place within a competitive environment. The Commissioner is satisfied that the third party does have commercial interests.
24. VisitScotland submitted that, since the content disclosed already reveals the cost of the third party's services, providing its name would disclose information that could impact upon its ability to maintain a competitive advantage in what is a very commercially competitive environment. It maintained that disclosure would allow other companies to undercut this third party and therefore prejudice substantially its ability to compete in the private sector.
25. The Commissioner has considered these points, but he is unable to accept that disclosure of the third party's name would or would be likely to prejudice substantially its commercial interests.



26. The Commissioner has commented in previous decisions that a commercial company's contract with a public authority is for a specific purpose and agreed work. Although another piece of work may be similar, it is unlikely that a new piece of work would be exactly the same as a previous contracted offering. Any bid for a future contract will be based on the specification provided by the contracting party, and the particular circumstances at the time of the tendering process.
27. Tendered prices for new offerings will need to be based upon the particular mode of delivering the required service proposed by the bidder and the costs to the bidder of delivering that service. A bidding or pricing strategy for any tenderer would be based upon an analysis of the contracting organisation's requirements and would need to reflect its own structure, staffing and costs. This means it would be a complex task for competitors to predict what another company's price will be prior to contract award. The Commissioner does not believe that such a prediction could be made on the basis of the total cost of a previous contract.
28. For these reasons, the Commissioner does not accept that knowing the value of a contract held by a particular provider will provide insights into an incumbent company's future pricing strategies, or allow any particular advantage to competing companies in bidding for future contracts with VisitScotland or other organisations.
29. In reaching this conclusion, the Commissioner has noted that, when consulted, other contractors named in similar contexts within report 3 indicated that they were willing to accept disclosure of their names.
30. While the Commissioner recognises that the challenges and circumstances facing each contractor will differ, the willingness of the other contractors to see their names disclosed in response to Mr Gordon's information request suggests that, for these other contractors, the effects of disclosure were not perceived as significantly harmful to their commercial interests.
31. The Commissioner can see no particular reason (and has been provided with no evidence by VisitScotland as to) why any prejudice to the commercial interests to the contractor which objected to disclosure would be greater than any experienced by the other contractors named in report 3. He cannot see (and again has seen no evidence to explain why) the likelihood of harm following from disclosure would be greater for the contractor that objected to disclosure than those who indicated willingness to be named.
32. In all the circumstances, the Commissioner does not accept that the disclosure of the name of the third party withheld within report 3 would, or would be likely to, prejudice substantially its commercial interests.
33. Since the Commissioner has not upheld the reliance on section 33(1)(b) to withhold the name of the third party company in report 3 he is not required to consider the public interest test associated with withholding of this information.
34. Since the exemption in section 33(1)(b) is the only one applied by VisitScotland to this particular information, the Commissioner has concluded that VisitScotland acted in breach of Part 1 and section 1(1) of FOISA by withholding the name of the third party.





*Consideration of the commercial interests of VisitScotland and members of the public*

35. The remaining information which is being withheld (within reports 5 (Fraud Prevention) and 7 (Annual Internal Audit Report)) and considered under section 33(1)(b) of FOISA relates to:
- staffing at Tourist Information Centres (TICs)
  - stock controls and
  - the processing of cash and card payments at TICs.
36. In its correspondence with Mr Gordon, VisitScotland claimed that the exemption in section 33(1)(b) applied (it was implied to all information being withheld at that stage) on the basis that disclosure would or would be likely to prejudice substantially the commercial interests of VisitScotland. During the investigation, VisitScotland additionally claimed that disclosure of this information would be likely to prejudice substantially the commercial interests of members of the public whose card payment details were held by TIC.
37. VisitScotland maintained that disclosure of the information withheld on this basis would increase the risk of credit card fraud by highlighting weaknesses of security measures within TICs and opportunities for fraud.
38. VisitScotland operates more than one hundred TICs, some of which are open every day of the year, while others are seasonal. TICs also vary considerably in size, scale and operation with regard to the number of employees and number of visitors served. The TICs offer a wide range of products and services, including travel advice and accommodation booking. Retail activities at the TICs include the sale of gifts, souvenirs and passes. A number of the TICs also offer a ticketing service for tours and events.
39. VisitScotland's retail income in the financial year 2008-09 was £4.4 million, approximately 6.5% of the overall income for the organisation<sup>1</sup>. Like other retailers, TICs accept debit/credit card payments and therefore also provide credit card refunds.
40. The Commissioner is satisfied that VisitScotland has commercial interests in relation to the retail services offered by its TICs. These services are offered in a competitive environment in which VisitScotland is one of a number of alternative suppliers available to its customers.
41. However, the Commissioner is unable to accept that members of the public have a commercial interest in the sense claimed by VisitScotland. While the Commissioner accepts that it would clearly be harmful to customers' interests if the security of their transactions was undermined, he is not persuaded that this is a commercial interest for the purposes of section 33(1)(b) of FOISA. He would take the view that the customers of VisitScotland's TICs are engaging in a transaction with a commercial operator (as they will do with any other retailer with which they do business), but they themselves are not commercial operators.

<sup>1</sup> Source - VisitScotland's 2009 annual review: <http://www.visitscotlandannualreview.com/performance/>





42. The Commissioner therefore does not accept that the exemption in section 33(1)(b) can be applied in this instance on the basis that disclosure would be harmful to the commercial interests of members of the public whose credit card transactions are processed by VisitScotland. However, he would note at this point that the effect of disclosure on these individuals would be a relevant consideration when applying the public interest test to information for which it is accepted that disclosure would or would be likely to prejudice substantially the commercial interests of VisitScotland.
43. Having accepted that VisitScotland has commercial interests in relation to the retail activities of its TICs, the Commissioner must now go on to consider whether these interests would be prejudiced substantially by the information withheld by VisitScotland within reports 5 and 7.
44. In doing so, he has had regard to the views expressed in previous decisions and reiterated in his published briefing on the section 33(1)(b) exemption. In particular, this states:
- The harm which would, or would be likely to, result from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Damage would also have to occur in the near future, and not at some distant time.*
- FOISA sets out that that the exemption can be applied where release would be 'likely' to cause harm. The Commissioner therefore takes the view that there must be a significant probability that the required degree of harm would occur in order for the exemption to be appropriately applied.*
45. The Commissioner has considered all of the information withheld within reports 5 and 7, and he accepts in most cases that disclosure of this information would increase the risk of theft or credit card fraud in VisitScotland's TICs. The reports highlight weaknesses in the systems of TICs, which, if widely known would increase their vulnerability and could potentially lead to losses.
46. The Commissioner accepts that disclosure of information that would increase the risk of fraud or theft would or would be likely to prejudice substantially the commercial interests of Visit Scotland.
47. During the investigation, VisitScotland was asked to explain what steps had been taken in the light of the recommendations in report 5 (issued in April 2008) and the stage reached in implementing these by the time its review of Mr Gordon's information request (the outcome of which was communicated to Mr Gordon on 12 May 2009). The Commissioner's consideration of any case must focus on the circumstances and the effects of disclosure at the date when the public authority notified the applicant of the outcome of its review. In this case, that date is more than a year after the issue of report 5, and around six months after the issue of report 7, which referred to the issues identified in report 5.



48. VisitScotland explained that it had taken the findings and recommendations of report 5 seriously and had put in place measures to address the weaknesses identified therein. However, it stated that this was still a work in progress and until another audit was undertaken (once every two years) the changes that had been made could not be verified to ensure that they were effective.
49. The Commissioner accepts that steps taken to address weaknesses in systems and lessen the risk of fraud or theft will take time to be implemented and tested. In this case, he has concluded that the passage of time has not yet significantly diminished the likelihood of harm to VisitScotland's commercial interests as a result disclosure of the information requested by Mr Gordon.
50. For the above reasons, the Commissioner accepts that VisitScotland correctly applied the exemption in section 33(1)(b) to all of the information under consideration within report 7 (Annual Internal Audit Report), and to most of the information under consideration within report 5 (Fraud Prevention).
51. However, the Commissioner does not accept that disclosure of the information within report 5 specified below would or would be likely to prejudice substantially the commercial interests of VisitScotland, and so he has concluded that the exemption in section 33(1)(b) was wrongly applied to this information:
- The information withheld on page 4
  - The introductory sentence and the final bullet point withheld on page 6,
52. In reaching this conclusion, the Commissioner has noted that the information is of a different nature from that withheld elsewhere in report 5. It relates to staffing and stock control matters rather than procedures for handling transactions and card payments.
53. The Information relating to stock controls summarises information contained elsewhere in the parts of report 5 already disclosed to Mr Gordon. Staffing arrangements will generally be readily observable to visitors to the TICs and the communities in which they are located.
54. The Commissioner does not agree that disclosure of this information would increase the risk of fraud or theft in the manner suggested by VisitScotland, and he has concluded that disclosure of this information would not be likely to prejudice substantially VisitScotland's commercial interests.

*The public interest test*

55. As noted above, the exemption under section 33(1)(b) is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner must therefore go on to apply this test in relation to the information he has found to be exempt in terms of section 33(1)(b). This involves considering whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.



56. With respect to the public interest, VisitScotland emphasised the risk of fraud that would follow from disclosure. It argued that it would be irresponsible for a public body to highlight weaknesses in its systems that would in turn provide unnecessary risk to third party credit card holders.
57. Mr Gordon argued that it is not enough to claim that disclosure would somehow provide would-be thieves with a “how-to” guide to robbing VisitScotland, not least because any security weaknesses flagged up should have been rectified in the period since their identification. He submitted that the public interest would be served by other public bodies learning best practice from disclosure and VisitScotland could take credit for its action on the issue.
58. In general the Commissioner finds there is a public interest in the disclosure of information which would identify the areas where improvement is required by a public authority; show that these issues are being taken seriously; and identify recommendations or actions as to how shortcomings can be resolved.
59. He has noted that, by the end of his investigation, VisitScotland had disclosed most of the information contained in the seven reports requested by Mr Gordon, and in so doing has recognised the public interest in its activities and allowing public scrutiny of these.
60. However, where it is accepted that disclosure would lead to an increased risk of fraud, significant weight must also be given the public interest in maintaining the relevant exemption (in this case section 33(1)(b)), and withholding the information.
61. The Commissioner has recognised above that disclosure in this case would be likely to prejudice substantially the commercial interests of VisitScotland. Although he did not agree that members of the public whose card details are held by VisitScotland have commercial interests in this case, he does agree that disclosure could have a detrimental effect for these members of the public, by increasing the risk to them of card fraud. This would be contrary to the public interest and so is another factor weighing against disclosure in this case.
62. The Commissioner agrees that the steps taken by VisitScotland to address the issues identified in reports 5 and 7 should ultimately ensure that the risk of fraud will be lessened. He recognises that the balance of public interest in relation to this information is therefore likely to shift over time.
63. However, as noted above, he has concluded that the risk at the time of VisitScotland’s review of Mr Gordon’s information request would not have been significantly less than at the time when those risks were identified in the reports under consideration. He therefore considers that the public interest in maintaining the exemption in section 33(1)(b), where it has been found to be correctly applied in this case, is strong.
64. After weighing up the competing interests in this case, the Commissioner has concluded that, on balance, the public interest in disclosing the information that the Commissioner has found to be exempt in terms of section 33(1)(b) of FOISA is outweighed by that in maintaining the exemption in section 33(1)(b) of FOISA. He therefore concludes that VisitScotland acted in compliance with Part 1 of FOISA by withholding this information.



### Consideration of section 39(1) – Health, safety and the environment

65. Having found that the withheld content within report 7 and much of the information withheld in report 5 was correctly withheld in terms of section 33(1)(b), the Commissioner will not consider the application of the exemption in section 39(1) to this information.
66. However, having concluded that the information specified in paragraph 51 above was not exempt in terms of section 33(1)(b), the Commissioner will now go on to consider whether the exemption section 39(1) of FOISA applies to this information.
67. Section 39(1) of FOISA states that information is exempt information if its disclosure under the Act would, or would be likely to endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
68. In the Commissioner's briefing on this exemption, it is noted that section 39(1) does not contain the usual harm test. Instead of the "substantial prejudice" test, this exemption refers to the "endangerment" of health or safety. The harm test in section 39(1) has therefore been set at a lower level.
69. In order for a public authority to rely on this exemption, it must show that the disclosure of the information would, or would be likely to, endanger the physical or mental health or the safety of an individual. Danger to physical health could mean a danger to a person as a result of physical injury, illness or disease. Danger to mental health could mean any type of psychological illness which results from information being released.
70. The Commissioner's view is that the term "endanger" is broad enough to apply where there is a (direct or indirect) threat to the health or safety of a person which would foreseeably arise in the future as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner considers that for endangerment to be considered likely there must, however, be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
71. VisitScotland submitted that disclosure of the information to which it applied section 39(1) would be likely to endanger the physical health and safety of its staff by revealing measures relating to the safeguarding of cash, credit card details and stock, and thereby increasing the risk of theft, robbery and physical assault at its TICs.
72. VisitScotland also submitted that there was also a risk to employees' mental health, as employees may become concerned and anxious if VisitScotland disclosed details of security measures in the place in which they work.



73. The Commissioner has considered all of the arguments made by VisitScotland. However, he has noted that the information in relation to which these are most relevant has already been found to be exempt in terms of section 33(1)(b). He notes that the remaining information under consideration in this decision and in relation to which he has considered the application of section 39(1) does not include details of security measures or the handling of card payment details.
74. As noted above, the remaining information is of a different nature from that correctly withheld in terms of section 33(1)(b). It relates to staffing and stock control matters rather than security and procedures with respect to transactions and card payments.
75. Having considered this information, the Commissioner is not persuaded that its disclosure would or would be likely to endanger the health or safety of any person. As noted above, the information relating to stock control that has been withheld summarises information disclosed elsewhere within report 5. Staffing arrangements at TICs will be well-known in the local communities and could be obtained by simply observing the TIC.
76. The Commissioner would note that, like any other retail outlet, TICs exist in an environment where an ongoing risk of theft and robbery exists. This risk needs to be managed to ensure that measures are in place to protect staff members should it happen. Indeed, VisitScotland informed the Commissioner that one of its TIC was subject to a robbery (outside business hours) in 2009.
77. However, the Commissioner is not persuaded that the disclosure of the particular information detailed in paragraph 51 would or would be likely to increase the risk of robbery or theft in its TICs.
78. Therefore the Commissioner has concluded that the exemption in section 39(1) does not apply to the information specified in paragraph 51 above. Since the Commissioner has concluded that neither of the exemptions cited by VisitScotland applies to this information, he finds that VisitScotland acted in breach of Part 1 and section 1(1) of FOISA by withholding this information from Mr Gordon.

## DECISION

The Commissioner finds that VisitScotland partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Tom Gordon.

The Commissioner finds with respect to the majority of the information withheld within information report 5 (Fraud Prevention) and all of the information withheld in report 7 (Annual Internal Audit Report) in terms of section 33(1)(b) of FOISA, VisitScotland complied with Part 1.



However, VisitScotland failed to comply with Part 1 and section 1(1) of FOISA by withholding the name of the third party in report 3; and the information within report 5 (Fraud Prevention) specified in paragraph 51 above.

The Commissioner now requires VisitScotland to disclose the name of the third party in report 3 and the information specified in paragraph 51 by 22 April 2010.

## Appeal

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Should either Mr Tom Gordon or VisitScotland wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**8 March 2010**





## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

##### 39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.